

Tagged Opinion

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach Division**

IN RE:

Case No.: 01-30953-BKC-SHF
Chapter 7 Proceeding

ABRAHAM DAVID GOSMAN,

Debtor.

_____/

JOSEPH J. LUZINSKI, Trustee in Bankruptcy
for the estate of Abraham David Gosman,

Plaintiff,

Adv. No.: 03-3228-BKC-SHF-A

vs.

PEABODY & ARNOLD LLP, and
JOEL REINSTEIN, P.A.,

Defendants.

_____ /

**ORDER GRANTING MOTION OF DEFENDANT, PEABODY & ARNOLD, LLP, FOR
RECONSIDERATION AND DISMISSING COUNTS I, III, AND IV OF
SECOND AMENDED COMPLAINT**

THIS MATTER came before the Court on November 28, 2006, on Defendant Peabody and Arnold LLP's Motion for Reconsideration of Order Granting In Part and Denying In Part Peabody & Arnold, LLP, and Joel Reinstein, P.A.'s Motions to Dismiss Plaintiff's Second Amended Complaint(C.P. 88) ("Motion for Reconsideration"). On October 10, 2006, the Court entered an Order Granting in Part and Denying in Part Motion to Dismiss Case (C.P. 84). In effect, the Court granted the Motion to Dismiss as to Counts V and VI and denied the Motion to Dismiss as to Counts I, II, III, and IV. Peabody and Arnold, LLP now seek to have this Court reconsider the Motion to Dismiss as to Counts I, III and IV. The Court, having carefully considered the Motion for Reconsideration and being otherwise fully advised in the premises, **grants** the Motion for Reconsideration, and **dismisses** Counts I, III and IV.

In December 1996, Peabody & Arnold, LLP ("Peabody") and its partner, Robert Vigoda ("Vigoda") were engaged by the debtor, Abraham Gosman ("Mr. Gosman") for the purpose of estate planning. Peabody and Vigoda continued to render legal services for Mr. Gosman until Vigoda left Peabody in January, 2000. Joel Reinstein, P.A. ("Reinstein") was originally engaged to represent Lin Castre-Gosman ("Ms. Gosman") on October 4, 1999. Reinstein allegedly discussed asset protection with Ms. Gosman. On October 10, 1999, Mr. and Ms. Gosman executed an amendment to their antenuptial agreement whereby Mr. Gosman conveyed a one-half fee interest in the real property located at 513 North County Road, Palm Beach, Florida, together with a one-half interest in the artwork and furnishings located upon the referenced premises, to Mr. and Ms. Gosman as tenants by the entirety. Additionally, \$2 million in cash was transferred to Ms. Gosman. The amendment stated that the transfers were in consideration for Ms. Gosman's waiver of her right to pursue remedies resulting from Mr. Gosman's alleged default under their original antenuptial

agreement. The amendment was prepared by Reinstein and Vigoda. On March 2, 2001, Mr. Gosman filed a voluntary petition under Chapter 11. On June 25, 2002, Mr. Gosman converted the case to a Chapter 7 proceeding. On July 1, 2002, Joseph J. Luzinski was appointed chapter 7 trustee for Mr. Gosman.

On March 1, 2005, and following the trial of the adversary proceeding styled *Joseph Luzinski, trustee vs. Abraham Gosman and Linda C. Gosman*, Adv. Pro. No. 02-3155-BKC-SHF-A, the Honorable Larry Lessen, Visiting United States Bankruptcy Judge, entered an opinion (C.P. 506) finding that the October 10, 1999 transfers of the North County Road property, certain delineated artwork, and \$2 million in funds, together with other items, were effected with the actual intent to hinder, delay and defraud creditors at a time when Mr. Gosman was insolvent. The Court further found that the transfers of assets from Mr. Gosman to Mr. Gosman and Ms. Gosman as tenants by the entirety violated the Florida Fraudulent Asset Conversion Statute, Section 222.30. The Court entered Judgment avoiding the transfers, ordering turnover of the transferred property to the trustee, and awarding compensatory damages against Ms. Gosman in the amount of \$66,539,181.01.

Peabody seeks reconsideration and dismissal as to Count I of the Second Amended Complaint. Peabody predicates its prayer for relief upon recent case law issued by the Eleventh Circuit Court of Appeals in *Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1149-50 (11th Cir. 2006) regarding the doctrine of *in pari delicto*. Under the principle of *in pari delicto*, a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing. *Edwards* at 1151-1152. If a claim by the debtor “would have been subject to the defense of *in pari delicto* at the commencement of the bankruptcy , then the same claim, when asserted by the trustee, is subject to the same affirmative defense.” *Id.* at 1150. The

Court is bound by the conclusions of law set forth in *Edwards*. The bankruptcy trustee succeeds to the rights of the debtor and has standing to bring any suit that the debtor could have brought outside of bankruptcy. The Bankruptcy Code provides that property of the estate includes “ all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). “ Legal interests or equitable interests” include any causes of action the debtor may bring. *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc.*, 267 F.3d 340, 356 (3d Cir. 2001). The trustee’ s standing to bring suit is limited by certain defenses that could have been raised against the debtor, including the equitable defense of *in pari delicto*. *Id.*

Under the foregoing analysis, the Court finds, as a matter of law, that the *in pari delicto* defense does apply to the bankruptcy trustee and further applies directly to the facts *sub judice*. This Court, by way of the March 1, 2005 Order, has determined that Mr. Gosman acted with intent to defraud creditors when transfers were made between Mr. Gosman and Ms. Gosman.

Based on the foregoing, the Court finds that the challenged transfers -North County Road transfer of July 30, 1999, the artwork and furnishings transfer of October 10, 1999, the \$2 million transfer of October 10, 1999, the Blossom transfer of November 14, 2000, the \$3.1 million transfer of the Gulfstream proceeds, the February 5, 2001 transfer of \$600,000 - were made with the actual intent to hinder, delay, and defraud creditors. The transfers were also constructively fraudulent. Ms. Gosman did not provide reasonably equivalent value in exchange for the transfers, and Mr. Gosman was insolvent at the time of each of the transfers. Moreover, Mr. Gosman was not paying his debts as they came due at the time of each of the transfers, and each transfer deepened Mr. Gosman’s insolvency. The transfers had the added effect of leaving Mr. Gosman with inadequate capital. Therefore, all of the transfers are avoided under Fla. Stat. § 726.105.

Luzinski v. Gosman, Judge Lessen Opinion (C.P. 506), Pg. 42 , Adversary Proceeding No. 02-3155-BKC-SHF-A.

Mr. Gosman, through the trustee, cannot sue Peabody for professional malpractice regarding the subject fraudulent transfers since both parties, Peabody and Mr. Gosman, would be considered to have committed a wrongdoing. Mr. Gosman did not possess a cause of action against Peabody at the commencement of his bankruptcy case for the reasons set forth above. As such, the trustee likewise does not possess a cause of action against Peabody. Therefore, the Court **grants** Peabody & Arnold, LLP's Motion for Reconsideration, and **dismisses** Count I.

The Court has reconsidered the argument advanced in connection with Counts III and IV of the Motion for Reconsideration and concludes that these Counts likewise should be dismissed. The Court finds the defense of *in pari delicto*, as detailed above, equally applicable to Counts III and IV, Conspiracy to Defraud Creditors and Conspiracy to Commit Fraudulent Asset Conversion, respectively. Mr. Gosman could not have asserted a cause of action against Peabody to defraud creditors or commit fraudulent asset conversion at the commencement of his bankruptcy case, and as such, the trustee likewise may not assert a cause of action against Peabody for conspiracy as to these causes of action.

The Court further finds that Counts III and IV of the Second Amended Complaint fail to allege a cause of action upon which relief could be granted as a matter of law. An actual conspiracy requires an actionable underlying tort or wrong. *Wright v. Yurko*, 446 So.2d 1162, 1165 (Fla. 5th DCA 1984); *Rushing v. Bosse*, 652 So.2d 869, 875 (Fla. 4th DCA 1995); *Posner v. Essex Insurance Company, Ltd.*, 178 F.3d 1209, 1217-1218 (11th Cir. 1999). "Florida does not recognize an independent action for conspiracy." *Allocco v. City of Coral Gables*, 221 F.Supp. 2d 1317, 1360-61 (S.D. Fla. 2002). A review of the Second Amended Complaint reveals that the Plaintiff's have failed to allege an actionable underlying tort or wrong such that a conspiracy could be proven.

The Second Amended Complaint alleges that Peabody devised methods to facilitate a transfer of property away from Mr. Gosman to Ms. Gosman (Compl. ¶ 64). Additionally, the Second Amended Complaint alleges that Peabody knowingly assisted in effectuating a transfer of assets from Mr. Gosman to Ms. Gosman which had the effect of rendering the property immune or exempt from claims of creditors (Compl. ¶¶ 70,71,72). Therefore, while the Plaintiff alleges a conspiracy, the underlying factual basis advanced by the Plaintiff does not create a cause of action. “Neither section 222.30 nor chapter 726, Florida Statutes, creates a cause of action against a party who allegedly assists a debtor in a fraudulent conversion or transfer of property, where the person does not come into possession of the property.” *Bankfirst v. UBS Paine Webber, Inc.*, 842 So.2d 155, 157 (Fla. 5th DCA 2003). As alleged in the Second Amended Complaint, Peabody aided and assisted in the transfer of assets but was neither the recipient nor depository of any such transfers (Compl. ¶¶ 64,70,71,72). The Court is persuaded by the contention of Peabody that the facts as alleged in Second Amended Complaint may state a cause of action for aiding and abetting a fraudulent transfer, but such a cause of action is not recognized under Florida law. Since there is no cause of action, there can be no conspiracy. Accordingly, the Court **grants** Peabody and Arnold’s Motion to Dismiss the Second Amended Complaint as to Counts III and IV. Accordingly, it is

ORDERED that the Motion to Dismiss Plaintiff’s Second Amended Complaint as to Peabody and Arnold, LLP, as to Counts I, III and IV is **granted**.

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Copy to:

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Attorney Glazer is directed to provide a copy of this Order on all parties in interest.
